SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

69 Civ. 200

Before:

HON. DAVID N. EDELSTEIN,
Chief Judge

New York, N.Y.
April 14, 1972 - 2:15 p.m.

APPEARANCES:

WHITNEY NORTH SEYMOUR, JR., ESQ.,
United States Attorney,
For the Government,
BY: RAYMOND M. CARLSON, ESQ.,
Anti-Trust Division, Department of Justice.

JOSEPH H. WIDMAR, ESQ.,
Anti-Trust Division, Department of Justice.

GRANT G. MOY, JR., ESQ.,
Anti-Trust Division, Department of Justice.

JAMES I. SEROTA, ESQ.,
Anti-Trust Division, Department of Justice.

APPEARANCES (Continued):

CRAVATH SWAINE & MOORE, ESQS.,
Attorneys for Defendant,
One Chase Manhattan Plaza,
New York, New York
BY: THOMAS D. BARR, ESQ.,
-and-
GEORGE B. TURNER, ESQ.,
Of Counsel.

* * *

THE COURT: Good morning, gentleman.

MR. BARR: Your Honor, perhaps I ought to begin, if that pleases the Court, by explaining to the Court why we are not, today, going to Cape Kennedy.

THE COURT: Well, some discussion in this area is certainly indicated and anything that can help to unshroud this mystery is certainly necessary, I believe, for the record.

MR. BARR: I will do the best I can, your Honor, although there remains a mystery which I am not able to pierce.

The matter was first discussed with the Court in our session in February -- February 23rd of this year -- and, after Mr. Schwarz had spoken to one of the Court's clerks, following the suggestion made during the February 23rd session, IBM made some tentative arrangements with the personnel at Cape Kennedy to accommodate a group

of people then designated only as a group of people from IBM at the Cape this weekend and, further --

THE COURT: Would you indulge me for one moment, Mr. Barr?

MR. BARR: Certainly, sir.

THE COURT: I am unhappy about interrupting you but I would appreciate it as you narrate your versions and your involvements, in this matter, that you would indicate wherever possible the names of any people with whom you had any discussion or communication and their position, if you know.

MR. BARR: All right, sir.

I cannot give the Court at this time the names of the people at Cape Kennedy although certainly I can furnish that.

I didn't at that time think of it as a matter with respect to which I ought to keep a record, although there came a time when I did begin to believe that and I did attempt to retain some information.

In any case, we made tentative preliminary reservations for -- reservations is not the right word -- accommodations were made, the persons representing NAJA at the Cape had no problems. It was all done in a very [illegible] sort of way, but our intention was quite clear

and, as I say, the matter was entirely one of IBM doing it.

The week before last, pursuant to a suggestion, I believe made initially by Mr. Schwarz, who is today in St. Paul before Judge Neville, your Honor, the reason he is not here, with either Mr. Carlson or Mr. Widmar, that in order to button down all of the final details in connection with the trip, that it might be wise to put a NASA man in contact with Mr. Paul Knaplund an IBM vice-president, who had been making the general arrangements and was in general charge of making the arrangements for the trip.

On Monday of last week, that is, Monday the 3rd, I suppose, we were put in contact with Mr. Siegel and I believe that is S-i-e-g-e-l, although I am not certain, who is an attorney representing NASA, with the Government, a former employee of the Department of Justice.

Mr. Siegel had conversations both with Mr. Knaplund and with Mr. Schwarz. The substance of those conversations was that he believed that it was his obligation to insure that the Court did not receive a distorted view of what was going on at NASA and that he, being a Government lawyer, naturally was an advocate on the side of the Government in connection with the litigation,

since what we had asked for, your Honor, was that he put together two people who could be responsible for finalizing all the details, I then called Mr. Widmar and Mr. Carlson and I believe spoke to them both at the same time on the telephone.

I asked that Mr. Widmar or someone, who Mr. Widmar informed me that he and Mr. Siegel had proposed to meet with Mr. Knaplund.

I asked for Mr. Widmar's assurance that there would be no discussions at that meeting relating in any way to the substance of the litigation, but that the meeting would be confined only to the arrangements and the details of the arrangements for the trip that we had planned.

Mr. Widmar gave me that assurance. The next morning, a session was held in Washington at which Mr. Knaplund, Mr. Widmar and Mr. Siegel attended and the following morning, a Wednesday morning, a final meeting was held, what we felt was a final meeting in Washington, between Mr. Siegel and an IBM representative whose name is Jenks -- Mr. Knaplund, tell me the name, so I get it straight.

MR. BARR: Thank you.

And we thought at that meeting on Wednesday morning, that everything was fine.

No problems of any kind were raised, the passes

to get us into the facility and into the various buildings were going to be issued,no problems of any kind.

Late on Wednesday afternoon, indeed, early evening, Mr. Knaplund in New York received a call from Mr. Jenks who informed him that Mr. Siegal, in response to a call made by Mr. Jenks regarding a detail, had said that the trip was off, that under no circumstances would we be permitted on the premises, that we explored, your Honor, whether there were problems in connection with the shot itself and whether there was any way in which we might be impeding things and therefore could come a little later or go to one place or another place, and the answer in every case was no, we could not come, we could not go to Cape Kennedy,and we could not go to Houston.

It was said that if your Honor wished to go by himself and were to approach the Government in that connection, that the Government might accommodate the Court, but that it would not accommodate a party consisting of the Court, the Department of Justice and IBM together.

I, then, the next day, called Mr. Carlson on the telephone and I reported the substance of what I have just recited -- that is, the additional substance which he did not then know about, and I asked Mr. Carlson to state to me what the Government's position, the

plaintiff's position was, with respect to this matter.

Mr. Carlson said that he would have to get back to me and, in due course, he did. He reported to me that he had had a conversation with Mr. Wilson and Mr. Comegys, who are the acting Assistant Attorney General and the, I guess, acting Deputy Assistant Attorney General, that Mr. Comegys had given Mr. Carlson a message which he then quoted for me and in substance that message was this -- that Mr. Comegys could not or would not do anything; that he would not call the attorney general, that he would not call NASA, and that that was the end of it as far as he was concerned.

At that point, since the kinds of reasons that were being put forward now by NASA were that we would be in some way in the way of the shot, that we might jeopardize the mission, that we might, ourselves, get hurt in some ways, I called your Honor and left a message that we were being refused admission by the Government to the facilities at the Cape and at Houston.

Now, your Honor, I do not consider that to be a particularly satisfactory explanation. It does not satisfy me, but it is all that I know about the subject and all that I was able to find out either prior to the time I called the Court or up to this point.

I do not know why there was the sudden apparent total about face in the Government's attitude.

I would like to say that we still believe, very strongly, that such a session, such a trip, such an inspection, would be beneficial to the Court and would hope that the Government's cooperation could be obtained so that we could at some future point make such a trip.

MR. CARLSON: If the Court please, first, may I introduce to the Court another member of the Government's staff who is with us today, he is Mr. Serota, a member of the Bar of the State of Illinois.

THE COURT: What is his position in the Department?

MR. CARLSON: He is an attorney in the Department of Justice assigned to the IBM case, the case we are before your Honor on.

I think what I should say first with regard to the comments that Mr. Barr has made is that the position of NASA was not, as far as the Government says it, an about face. It was, rather, a position that came about as the result of their being presented, about ten days ago, with some facts and considering the facts and the consideration that was given to those facts is stated in three affidavits of the persons that were involved at

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the National Aeronautics and Space Administration.

They are affidavits of Mr. Neil B. Siegel, who is the gentleman that Mr. Barr referred to; an affidavit of John P. Donnelly, and an affidavit of O. B. Lloyd, Jr.

Now, the affidavits of Mr. Donnelly and Mr. Lloyd were sent to Washington from the NASA installations in the South by machine, so they are signed copies but I don't have the original as yet.

THE COURT: Who are these distinguished gentlemen?

MR. CARLSON: Mr. Donnelly is the assistant administrator for Public Affairs of the National Aeronautics and Space Administration.

THE COURT: You mean he handles public relations? Is that it?

MR. CARLSON: He handles all of the external relations of the administration --

THE COURT: You know, I would hope that at one of these sessions, Mr. Carlson, that some of your answers would be responsive, either by way of being affirmative or negative and that perhaps we ought to eschew all the rhetoric that we've been getting. Part of his job is public relations, is it not?

MR. CARLSON: I think that is true, yes, your

what

Honor. And Mr. O. B. Lloyd.

THE COURT: He has nothing to do with security as such, isn't that correct?

MR. CARLSON: I think he does have to do with security, your Honor, as a part of his job.

THE COURT: I thought there was a security division at both of these installations and it's my understanding, based upon my very limited knowledge of the operations of both of these centers, that he has very little to do with security as such, but let's get on.

MR. CARLSON: Mr. Lloyd is director of the Public Services Division of the Office of Public Affairs.

THE COURT: Would you interpolate and translate what that means?

MR. CARLSON: I think it means just what it says and that is that he is the public relations director for National Aeronautic and Space Administration.

The substance of what we have learned from NASA is that the conclusion was made by the administrator's office in NASA that the places that Mr. Barr and his party had set out for visiting were off limits during the times that the moonshot was to take place and during the times that were scheduled for this trip, not that the

installations couldn't be visited at other times, but that the safety of the persons involved in the moonshot and the investment of some $300,000,000 in the shot itself could be endangered by reason of the presence of persons not a part of the personnel with specific, assigned tasks, in connection with the moonshot and, it is also my understanding that, even had the arrangements been made or tried to have been made six weeks ago as Mr. Barr seems to state that they were, they could not have been made in the circumstances of the trip that Mr. Barr insisted take place, could not have been granted under the regulations and the security of the National Aeronautics and Space Administration.

Part of that is undoubtedly the sensivity of the kinds of operations, mechanical, physical and personal, that are going on in the various parts of the installations that were to be visited.

I think what comes through to me more than anything else is what I would consider a very poorly planned approach to this that Mr. Barr presented in not being able to advise us that, and I think probably they could have advised us, that this trip was impossible for this weekend and we didn't find it out until the face-to-face meetings with NASA at which time NASA was advised as to

just what IBM had in mind and what they planned to do and it was at that time, rather than sometime in the past, as Mr. Barr's statement would indicate, that NASA's judgment was made that the party that Mr. Barr proposed to take to Cape Kennedy and to Houston could not be in the various installations at the times and places that he had indicated to NASA and this was for the first time he had indicated to NASA that this party was to be in these particular places.

I don't propose to read the substance of the affidavits, your Honor, but I think that the affidavits very clearly support that position.

On the subject of Mr. Barr's call to Mr. Widmar and me concerning his request, and it was more in the nature of a demand than a request, that the Department of Justice intervene with the National Aeronautics and Space Administration as to their conclusion that the safety and integrity of the mission would be endangered by the party that Mr. Barr was proposing --

THE COURT: I don't know why you insist upon referring to this as a party. I can't understand that characterization whatsoever.

Perhaps you thought of it as a party; I did not.

MR. CARLSON: By that I only mean a group of persons that were to visit the installations. I didn't mean it in any sense of other than that.

THE COURT: I considered it a scheduled hearing.

MR. CARLSON: I think the Government was taking that view of it and the National Aeronautics and Space Administration advised us and advised Mr. Barr that the conditions under which the hearings were to be conducted were, made the hearing impossible under those conditions.

The point I was going to make, I started to make, your Honor, was that the head of the Anti-Trust Division responded to my request to him for advice, and instructed me to advise Mr. Barr that he would not intervene, the Department would not intervene in this kind of a decision where the national security was directly involved in the opinion and as stated by the Government agencies that had the responsibility for that operation.

I did not know, until Mr. Barr said it now, that anything had been said to Mr. Barr about the Court making the trip to the installations and that had not been brought to my attention. I am unaware of any discussion or circumstances that may be involved.

However, the affidavits make it quite clear that the National Aeronautics and Space Administration will,

and will be very happy, to make these facilities available to the Court and to the parties under conditions other than this space shot weekend and if I may refer to paragraph six of the Donnelly affidavit, it reads in part as follows:

"Mr. Donnelly directed," and I quote now, "Mr. Siegel to convey to the officials of IBM who proposed the trip that NASA would be pleased to show its facilities to the Court at an appropriate time not interfering with a launch schedule and to accommodate the visitors in every way, subject only to the agency's receiving reasonable notice."

Their point being, particularly on the last item, that it takes, at NASA, some good deal of time to make arrangements even on a non-moonshot weekend to make this kind of a trip and to visit the installations indicated but, I am informed by the Administration that it would be very pleased to have us and that this was not in the way of any kind of a roadblock and the affidavits made that very clear and it was not by reason of anything that the Department of Justice stated or said or conveyed to NASA about the substance of the trip that occasioned their decision; it was only and solely their judgment that the moonshot itself would be endangered

by reason of the appearance of the members of this group in the appointed places at the times that Mr. Barr indicated with the times that he required.

MR. BARR: May I respond to that, your Honor?

THE COURT: Yes.

MR. BARR: I want to sweep away any notion that anybody here would attempt to do anything that would in any way jeopardize a shot to the moon, the national security, endanger people or do anything of that sort whatsoever.

As we all know, many people visit these facilities on many occasions during shots and otherwise.

I want also to make it very clear that nobody, not Mr. Barr, as Mr. Carlson said, nor anyone else on behalf of IBM insisted on any circumstances, nor did they spring on NASA at some late date some curious and unusual requests.

When we were met with the rebuff by NASA at the last moment, we explored whether there was not anything that we could do, whether there was any way under which we could have access to any part of the facility and the answer was repeatedly, "No."

Now, I did not call Mr. Carlson to make a demand upon him that the Department of Justice do something;

rather, I, too, had thought that the Court had scheduled a hearing and that both parties, both parties, not alone IBM, were responsible to the Court to do what was necessary to make that hearing possible and to work out the accommodations.

Certainly at our last session, Mr. Carlson said on the record very loudly and very clearly that he thought the trip was a good idea, would be useful to the Court, would supply useful information.

So, when I called Mr. Carlson, I was eliciting what I thought the Court would expect and what I thought I was entitled to, which was the cooperation of the party on the other side which obviously had great influence, could obviously make this kind of thing happen, had they chosen to do so, and I thought I was entitled to elicit their assistance and that, instead of getting a Pontius Pilate like washing their hands of the affair that they would immediately spring into action to help us.

Plainly, they did not do so.

Now, your Honor, I think that we have to be candid with the Court on this matter and I think I would be less than candid if I did not say to the Court that in the day or so preceding this abrupt about face, we began to hear from the Government mention of the ITT affair,

we began to hear from the Government mention of the use of a plane by another corporation, from another corporation by a former head of the Anti-Trust Division, and all of a sudden, those matters seemed to have some relevance to what we were doing.

Now, I am not able to say that those are the matters that caused the about face. I do not know. But I think it is significant that the persons who seemed to have been involved with the decision-making process here were not persons dealing with the mechanics of the shot or security of what was going on in Kennedy or Houston, but, rather, with public relations people.

I don't think that we can draw the cloak of security and danger and so on over this and say, that is why it didn't happen.

I would like to point out that for reasons that I cannot understand, apparently the first time, maybe the first time that the Department of Justice communicated with NASA was on the 27th of March, according to Mr. Siegel's affidavit.

THE COURT: Again, who is Mr. Siegel?

MR. BARR: Mr. Siegel is an attorney in the Office of General Counsel of the National Aeronautics and Space Administration, according to his affidavit.

THE COURT: Not the general counsel.

MR. BARR: Not the general counsel, and he is the person who, upon calling Mr. Schwarz and Mr. Knaplund, informed both of them that he believed he had to do something to prevent the Court from getting a distorted view of what was going on by the presentations that might be made by IBM during the course of these hearings.

I don't know why he thought he had that obligation or why he thought he knew anything about what was going on, what the lawsuit was all about, but he evidently did.

MR. CARLSON: May I hand to the Court the affidavits of the persons involved?

Mr. Siegel's affidavit is on the top, your Honor.

I would call your Honor's attention to one more item in the affidavit and that's in Mr. Siegel's affidavit, paragraph 16, and that is that the decision to cancel the trip, and I quote, "Was reached solely as a result of discussions between NASA and IBM based on problems of timing and proposed itinerary during an Apollo Mission,"and the wording earlier in the affidavit, in item 13, is to the effect that these times and places were during the critical phases of an Apollo Mission,

and I earnestly say to the Court that that is my best information as to why the decision was made and that the decision was made solely on that basis.

THE COURT: Have both of you concluded?

MR. BARR: Yes, your Honor.

THE COURT: I should like to spread on the record a summary of the events, circumstances and steps leading up to this hearing, which was scheduled at Cape Kennedy and Houston.

I think I would like to start by pinpointing portions of the transcript relating to this matter and, so, I turn now to page 33 of the transcript of March 6th. . .,

"MR. CARLSON: This is a highly specialized group of data processing installations for particular scientific and other very specific purposes, and I was concerned and I remain concerned that it may give a rather distorted picture as to what the Government claims this case is about, but I agree with counsel that there are many parts of the installation at both of these centers that will be directly involved in this case, and I agree with counsel that the understanding that can be gained as to the kinds of things that we are talking about can be advanced considerably, we believe, on the Government's side, by this kind of a trip."

THE COURT: Page 36.

"MR. CARLSON: Now, I did not push the matter at the time because I felt that the budgetary authority would require me to object to the transcript itself, which I have just stated to your honor I think it could be very helpful to the consideration of this issue, and so that it is my simple problem within the Department of Justice."

THE COURT: Page 41.

"MR. CARLSON: Along those lines it occurs to me it may be appropriate to have the representative from the National Aeronautics and Space Agency as part of the Government's party, whether it be counsel for somebody from Houston or otherwise, present, but I think that would probably be appropriate and I don't have any idea what that would do to the arrangements as far as space and so forth is concerned. We will just have to talk about that."

THE COURT: Page 47.

"MR. BARR: For example, I think it is very helpful to have Mr. Carlson say to the Court that the things that you are going to see in Cape Canaveral or Cape Kennedy and Houston are highly specialized data processing installations because, in fact, the equipment that is

there in many instances is standard commercial equipment which IBM markets themselves to commercial customers and one of the things, one of the hurdles we have been trying to get over with the Department for some time is to convince them that what is really out there, that they want to exclude from the market place, is not different from what they want to put into the market place.

"I would hope that the trip would serve the purpose of helping to enable us to put some content into the words because I could either agree or disagree with the definition depending on what it means and it is not an easy thing to say what it means."

THE COURT: I would now like to state for the record my information of what occurred by way of conversation in my chambers commencing on Thursday, April 16, 1972, approximately 4:25 p.m.

A telephone call was received from Mr. --

MR. BARR: March 16th, your Honor?

THE COURT: April 6th.

A call was received from Mr. Thomas Barr relating to the USA versus IBM case and the anticipated trip to Cape Kennedy, Houston, manned Space Center.

Mr. Barr telephoned to apprise the Court that he

had been notified of the Government's refusal to allow admittance to the installations at Cape Kennedy and Houston to the Court and interested litigants.

Mr. Barr indicated that this information was received from NASA. Upon receipt of the information, Mr. Barr telephoned Mr. Carlson to inquire about the turn of events.

As of Yesterday, Wednesday, April 5, 1972, all plans were final. Late in the afternoon of April 5th, Mr. Barr was told of some negative reaction from NASA, when NASA learned that the Court and the Department of Justice would also attend the installations, along with IBM representatives.

Mr. Carlson spoke with the acting Attorney General of Anti-Trust, Mr. Comegys, the latter indicating that he would not become involved and set aside NASA's ruling.

This information was communicated to Mr. Barr at his request. Mr. Barr alleged that no specific reasons were given for this change and subsequent withdrawal of permission. Mr. Barr stated that he will attend the pre-trial conference scheduled for April 14, 1972, if the Court desires. He will select some of IBM's planned presentations to show the Court on this later

date.

Thursday, April 6th, telephone conversation with Mr. Raymond Carlson, Anti-Trust Division, Department of Justice.

Mr. Carlson called at approximately 4:30 p.m. to state that he learned from the office of the Deputy Assistant Attorney General that the office of the Attorney General tried to get a Government aircraft from every place.

Mr. Carlson stated that the Attorney General's office was unsuccessful in attempting to locate and provide transportation for the trip scheduled for April 14, 1972.

MR. Carlson said that he had a conversation with Mr. Barr. Mr. Barr called Mr. Carlson to state that IBM had heard from NASA that they would not let IBM bring the Court and the Department of Justice to the manned space shot at Cape Kennedy or to the Manned Space Center at Houston.

After the conversation with Mr. Barr, Mr. Carlson stated that he saw the Assistant Attorney General. The Assistant Attorney General stated to Mr. Carlson that the Justice Department would not go to the Attorney General with NASA's refusal to allow the inspection of the entire installation at Cape Kennedy. It was the

position of the Anti-Trust Division that they would not become involved with the differences between NASA and IBM either way.

In view of this information, Mr. Carlson called Mr. Barr and said he checked with his front office. At this point, it was decided that the trip for April 14th was cancelled.

Mr. Carlson related that Mr. Barr's attitude after his last conversation was truculent. Mr. Barr indicated that he would to the President if necessary to obtain clearance.

The first reaction that I should like to indicate for the record is that Mr. Comegys' failure to cooperate and apparent unwillingness to implement the decision of the Department of Justice by its counsel, Mr. Carlson, perhaps tells its own story.

His negative reaction, I think, has very serious suggestions of embarrassment to the Attorney General of the United States and, indeed, to the entire Department of Justice.

I am further concerned that no effort was made by any representative of the Department of Justice to obtain an affidavit from one or more persons at NASA

charged and who are authorized and who have knowledge about the workings of these installations.

I do not consider the affidavits which have been submitted to me of any very compelling or persuasive effect.

I should also like to remark for the record that had the Attorney General known about this, that it is not at all unlikely that he might have wished for more substantive and more qualitative information for NASA as to the reasons why they chose to overrule a decision by the Department of Justice in a case which the Department claims is one of great importance and one which has far flung and very wide ramifications.

I assume, and I hope that time will bear me out, that the Department of Justice is serious about prosecuting and pressing this litigation in all good faith.

I now would like to turn to another matter.

I think from the very outset, I indicated to the parties concerned here that I would not travel in an IBM plane.

As a matter of fact, I undertook steps to provide for commercial transportation based on this Court's authority to issue its own vows and to take any trip in connection with any hearing in its official

capacity.

Also thought that it would be most helpful to all concerned that a Government plane should be supplied so that all the parties could travel together and thereby eliminate as much inconvenience as is possible under the circumstances.

That leaves us, now, today, with a schedule that has been completely countermanded by an agency of Government after a decision by the Department of Justice was made, after plans had been undertaken to implement that decision.

I would suggest that it is in the interest of the Department of Justice and, indeed, the acting Attorney General of the United States, that he not be kept shrouded in secrecy, that he be informed about these developments, that he be told precisely and exactly what happened. Although NASA seems to be quite sensitive by its public relations officers that this Court and the representatives of these parties to this litigation might in some way impede or interfere with the moon shot, apparently their concern was not wide enough to embrace the host of visitors whom they will be entertaining for purpose of this moon shot.

One other point I should like to make and

this turns to the installation at Houston.

I fail under any circumstances, even by virtue of attempting to strain my imagination, which at the very best is not great, I suppose, to see how this could possibly have interfered with Houston, because in no event would that installation have been the subject of inspection and discussion until after the moon shot because I think it was agreed that we would proceed after the moon shot and that we would be present at Houston on Monday and, indeed, if my fugitive recollection is of any aid and assistance, when we thought of coming home on Monday afternoon, I suggested that that might not afford enough time to all concerned for a very knowledgeable meeting and a very useful meeting and that indeed, we would return home the next day.

So, frankly, I think an inspection of the record is very revealing and no further comment need be made by me.

I am now prepared to go on to the next order of business.

MR. CARLSON: May I say to your Honor that I will inform the Attorney General.

THE COURT: He should have been informed at the very first instance and I think there was absolute

dereliction of duty not to advise the chief officer of this Department of Justice in a matter of great substance, in a piece of litigation of enormous complexity.

I think he was kept in absolute secrecy and I think that this should be corrected at the earliest possible time. And I think the negative attitude of an acting Assistant Attorney General, whose duties at the moment are very limited, to frustrate a plan and a hearing made by his representative, bears some further discussion and looking into.

Without reason, without an attempt or an effort to find out the whys and the wherefores, merely to defer and to sit back and say, "I'll do nothing, I will not become involved in this matter," and I ask you, by way of an instruction, that this entire record be presented to the acting Attorney General.

I think he would be interested.

MR. CARLSON: I shall personally see that it's done, your Honor.

THE COURT: Now I am ready. And I don't know why you didn't bring it to his attention in the first place.

Now, don't tell me about protocol. I was in the Department of Justice for seven years and I know

a little bit about the inner workings and they have not changed substantially and I know the meaning of loyalty to the Attorney General and I am not sure that it's been discharged here.

Unless I miss my guess, he'll be utterly amazed and very distressed about this occurrence. How many visitors are they going to have at this moon shot? Do you know, Mr. Carlson?

MR. CARLSON: I do not know, your Honor.

THE COURT: It will be quite a gathering, won't it?

MR. CARLSON: I understand there will be no visitors, other than personnel that are directly involved in it, in certain areas of this mission during the critical phases of it.

THE COURT: Now, as I understand, the reason for this planned meeting on this day was not merely to provide the Court with an opportunity to see the installations but actually to see its sophistication in its operation and its method and its performance in a very vital area.

Now, the Court has been substantially deprived of that opportunity, I would say, for all time. It's like showing the Court an automobile without giving it

an opportunity to see how it operates and what causes it to perform as it does.

So, to that extent, if this has been an important issue in the case, the Court's being frustrated of an opportunity of coming to grips with at least one issue in the most cogent possible way and that causes me to wonder and I think it may cause others to wonder when they read the record.

And particularly wonder, inview of some of the other problems confronting the Department of Justice.

Let's proceed.

MR. CARLSON: We have a number of matters that we wanted to advise your Honor about today, many of which are involved in the current production efforts of the Government under pre-trial order No. 2, as to which we had mentioned earlier that we would ask your Honor to, after we had drafted an appropriate order and attempted to obtain IBM counsel's consent to it, we would ask for the entry of an order that involves the safeguarding of proprietary and security matters and, because of certain problems raised by the Department of Defense in the last two days, we have not had an opportunity to talk to Mr. Barr or Mr. Schwarz about that order, but there remains before us the matter of presenting to your Honor

within the next few days, as soon as we can obtain the language that we, the parties, find satisfactory to take care of a particular problem of proprietary data, that I am advised the Department of Defense has with its evaluations of data processing equipment and we would request your Honor's indulgence for the presentation of a proposed order for the inspection of that material.

The inspection of other materials that are called for by pre-trial order No. 2, has begun and if your Honor wishes, I can give you a report on how that is proceeding and the manner in which it is being done.

The production and inspection by IBM of filed materials under pre-trial order No. 3 has also commenced; that is, the various agencies that were listed as recipients of pre-trial order No. 3 for purposes of advising the nature of their filing system so that we could take another bite at the possibility of arriving at an agreed production of documents here.

Those materials were due under the pre-trial order No. 3, on or about April 17th and they are already -- they already have begun arriving in volume and are being reviewed.

I should advert to one problem that the Department of Defense, two agencies of the Department of

Defense, have brought to the Department of Justice's attention just yesterday and we sat yesterday afternoon or perhaps it was Wednesday, either Wednesday or yesterday afternoon, with the general counsel of the Department of Defense and other representatives of the Department of Defense, as to materials involving two agencies of the Government and that's Central Intelligence Agency and National Security Agency, both of which are agencies of the Government named as those required to produce documents under pre-trial order No. 2.

Both have advised the Department of Justice that their statutes prohibit the making of these materials available and they asked that the Court indulge 30 days time so that we can brief the Court on the problems involved in the production of national security materials in their files that are covered by the order, pre-trial order No. 2, and we would like to present that on a regular briefing schedule, with affidavits as to the kind of material and present to your Honor the Government's arguments as to how we should proceed with that particular problem.

We have not had an opportunity, in the time that we were advised by Central Intelligence and National Security of their position on this, to sit down with

Mr. Barr and see whether there was some way we could work out either access to the material other ways to get at the information if, indeed, there is information in those files that is relevant to the case, but we have not had an opportunity to sit down with Mr. Barr and talk about that and I think that would be the first step in the presentation of that matter to your Honor.

The next thing I would advise the Court on is that we begin a deposition program on about April 7th. I believe there are three depositions set for Monday, April 17th, and the Government is attending those depositions and has agreed to be bound by those depositions.

We have encountered a physical difficulty and that is of being able to get access to the documents that Control Data Corporation has selected because of the existence of a 20 day period during which each party was to give, in that case, advice to the other in supplying documents to the Government.

I think that problem may also be one that we can work out but we will be going on with the depositions and talking to counsel for IRM about the mechanical problems and that -- but I wanted to inform the Court that we were laboring under some difficulties as far as access to materials are concerned,

that we thought we needed in preparation for these depositions.

Along the same area, we have a substantial number of documents, some 200,000, that we are waiting for delivery on and we haven't received them yet, from IBM.

It's microfilm, and again, the same matter of difficulty is involved -- namely, that we are beginning to participate in depositions as of April 17th without, we feel, all of the materials that we need to prepare and I would state this to your Honor because I may wish to ask your Honor to indulge us at some later date to take additional testimony from the witnesses involved if we learn from the rest of the documents that we do not now have, that some such testimony is necessary and appropriate.

I don't see any now but I wanted to state to your Honor that we will need or request that kind of protection if it is appropriate, after having received the documents that we do not now have.

We have planned to present to your Honor today the question of inadvertent waiver that Mr. Barr and I had both mentioned on the record on several occasions.

The Government had filed a motion and supporting papers but I was advised by Mr. Schwarz that IBM would not be ready for that and I told Mr. Schwarz that I had no objection to our putting that off to another date but we will just do without the waiver documents until such time as that could be resolved but I would ask your Honor, if it's appropriate, if you would set some dates within the limits of counsel's statement as to how much time counsel needs to prepare the responsive papers on this question, as to when we could make the argument to the Court on the question of inadvertent waiver and I think Mr. Schwarz' statement to me was that he thought that they could be ready by Friday of next week or thereabouts, as far as the submission of papers is concerned.

It may be that if we set a date for the next pre-trial in May sometime, that it would be appropriate to hear them at that time. I think it may wait for another month, your Honor, if that need be. I don't think our need for these documents is so pressing right now that it needs to go on immediately.

We would ask the Court for some help and direction, if we may, in some -- at least the Court's thinking -- and a couple of problems that we

anticipate may come up in connection with depositions that we are taking and that is, in the event that refusals to answer by witnesses, upon instructions of IBM counsel, are encountered, and this particularly relates to the inadvertent waiver documents, where, as we understand it, IBM counsel has not permitted its witnesses to answer questions as to the documents that are within the inadvertent waiver area, we were concerned whether that problem could go to the Court in the field where we were taking the deposition, as might be appropriate, or whether this Court would wish to hear those problems either from time to time or --

THE COURT: I would wish to hear these problems from time to time.

You would reserve all objections on all questions pursuant to Rule 37, is it not?

MR. CARLSON: Yes, your Honor.

THE COURT: For consideration by the Court.

MR. CARLSON: I think that's all the points I had for presentation to your Honor this morning.

MR. BARR: If I may, your Honor, take them up in reverse order.

The waiver question first, Mr. Carlson said the reason it is not being presented to the Court

is because IBM is not ready and you will recall, your Honor, that this matter was something that we discussed at the last pre-trial. The Government then indicated that it intended to bring the matter on.

We had to ask the Government to serve some papers on us for this motion and, in fact, they did not serve those papers on us until Friday of this week -- Monday of this week so that Mr. Schwarz responded that we could not get our papers back to them in time for this hearing because both he and I were out of town a good deal of this week, so the reason why the waiver matter is not before the Court is because the Government didn't make the motion until Monday of this week.

Turning to the depositions, now, and the Government's statement that it may not have all the documents that it needs and it may encounter some problem and wish to call some of those witnesses back, I simply want to make the record clear on what documents the Department does have and what documents it does not have.

The Government started an investigation here in 1967 and voluntarily, IBM furnished the Government with documents selected pursuant to the Government's instructions from the top 20 people in IBM, some number of that sort, the top 20 executives in the IBM

Corporation, quite a substantial number of documents which we prepared and furnished to the Government over a long period of time, in addition to a great deal of statistical information, pricing information and so forth.

The Government has had that information now for four or five years.

In addition to that, the Government has received from us or from CDC all of the documents which CDC selected from approximately 25 million documents produced by IBM to CDC.

Now, the Government has all of those documents and has had many of them for a very long period of time. What the Government does not have is the selections which CDC is currently making and has made over the last few months from the current production.

It will, in due course, be furnished with a copy of those documents which CDC has selected but, unless it chooses to participate in the document production itself, a choice that is always open to the Government at any point that it chooses to exercise that option, unless it chooses to send some people out to look at the documents, it is necessarily going to be behind the rest of us.

But it seems to me that having exercised the

chef

option not to participate in the document production by IBM but rather to utilize CDC as an agent to make the selections for it and then furnish documents to the Department, the Department is in no position to make a record before the Court that it ought at some later time to be entitled to seek the return of some witness.

Now, I know the Government has not made such a motion but I did not think I ought to let that go by without making the record clear on what the situation is.

I turn to the document production. The Court will recall that this came up at the pre-trial conference in February, that the Government then undertook to commence production of documents and the plain and simple fact is that the Government has thus far done very little in that direction.

Earlier this week, Mr. Carlson called me and said that they had some documents available. We have been down to Washington. The Government has produced for us thus far some documents received from third parties in response to inquiries received by the Department of Justice. Although the Government withholds from us, in connection with that third party production, certain documents which it describes as privileged -- that being

communications between attorneys for the Department of Justice and the third parties in writing.

They furnish us with materials, documents, sent from the third parties but they take away from us, on a claim of "privilege," the letters from the attorneys of the Department of Justice and the responses from the third parties and, in effect, they take away the indices and the material from which we could divine what the material they are giving us is supposed to represent and I suppose we will have to present that in the form of a motion in due course, unless the Government realizes that there is no such right on their part to withhold that material.

They have also furnished us with a small additional amount of material from the Department of Justice itself but, thus far, we have not received anything else from any agencies except we have begun to receive, now, these very voluminous descriptions of the files of other agencies and it seems that I must now make plain to the Court that these descriptions of files do not offer much in the way of a solution to the problem.

The Court will recall that the Department has suggested that if they furnished us with these file

descriptions, that we might be able to determine from these file descriptions what documents we wanted, since the Department of Justice says it can't determine from our document demand what we want.

Now, I have not seen the descriptions myself but I am advised that they are very large, very voluminous; they are being shipped into the Department of Justice from other agencies and turned over forthwith to us, so that the Department of Justice's attorneys are really serving as nothing more than a warehouse along the way between production of the documents, of the descriptions, and the agencies.

It seems that the procedure that we are embarking upon is going to look something like this -- we will have to sit down and look at these file descriptions. We will then have to take the depositions, it seems, of the persons in the agencies who are responsible for keeping the files so that they can tell you what is in those files, so that we can find where the files we are interested in are kept.

Now, your Honor, that is going to take a very, very long time before we get any production of documents that is meaningful from the Government.

Plainly, if I were to follow that kind of a

procedure, that is, if I were to turn over to the Department of Justice the voluminous and largely meaningless file descriptions within the IBM Corporation and say, you find, within these file descriptions, the files that you wish to have, which you have demanded, you can take the depositions of people within the IBM Corporation and find these documents, or if any other private party were to do that sort of thing, the lawyer on the other side would rise in outrage and the Court would quickly respond to that.

It may be that this is the only conceivable way that the federal system can operate; I don't believe that, however. I believe it can operate more efficiently but if the Government chooses to follow this course, it is necessarily and by its own choice, deliberately delaying this case for many years and I want my view of that to be very plain on the record because, until we have these documents and have a fair opportunity to analyse these documents and to take depositions on the basis of these documents, we cannot be thought, by any fair person, to be in any position to go to trial.

If the Government chooses this course and protests that it can do no better, it is forcing upon the Court and upon the parties a delay of many years.

Now, finally, Mr. Carlson raises two other problems with respect to the production of documents -- one is national security and one is what he calls proprietary information.

Certainly with respect to national security, whatever procedures are appropriate, are called for, to safeguard those matters, we will submit ourselves to happily.

With respect to proprietary information, and I should put that in quotation marks, because I take it what Mr. Carlson means by that is commercial information, commercial information received from third parties or commercial information of the United States Government; that is, the Government acting in the role of a buyer would like to claim that the method it uses in deciding which equipment to buy or evaluating equipment, is proprietary.

All buyers feel that way, all sellers feel that way on the other side. That is a routine, garden variety problem that lawyers and the courts deal with all the time and counsel are generally thought trustworthy to insure that their clients do not make inappropriate use of confidential commercial information on the other side and that, I think, is all we are talking about.

as far as the proprietary information is concerned.

That's all I have, your Honor.

THE COURT: Gentleman, there will come a time when I will set a deadline for the completion of all pre-trial preparation, towards a view of getting as early a trial as one can possibly get content with the interests of justice and I would urge you to keep that in mind.

I am not particularly happy using the word jockeying but for the moment it's the best word I can think of to suggest to you that if you have any jockeying in mind, that it's time to abandon that technique or strategy.

I will ask you to get on and get on with expedition.

I would also like to state now, before it slips my mind, that I do not conceive the incident of NASA countermanding a decision of the Department of Justice to be precedent and I would expect and hope that this would not occur again at any time in the course of this litigation and if your recollections need refreshment, I think at our very first conference, I stated that I expected the Department of Justice to designate counsel here to represent the United States of America with authority to make decisions that would be binding.

This litigation cannot possibly be moved in any other way and I want you to convey that to the Attorney General.

MR. CARLSON: I shall, your Honor.

May I say two or three things about what Mr. Barr brought up.

THE COURT: Yes.

MR. CARLSON: One thing, I am not sure of what the representation of Mr. Barr was, as to the continued production by Control Data. It was my understanding that we had that problem settled between us and that if this represents a change in Mr. Barr's position, as to our access to these documents, it will, I am frank to say to your Honor, set us back considerably in time.

We are awaiting on a very substantial number of documents for our preparation.

As to the documents that we have withheld within the Department of Justice that might be covered by the motion directed to the Department of Justice, they are the materials that are normally classified as, it's my understanding of it, lawyers work product and matters relating to confidential informants, and we shall, just as IBM has done, in the case of the materials it has produced, we shall list the materials that we are

withholding with the detail that is needed for a decision on the claim of privilege which I believe can be decided at an appropriate time by your Honor.

We were under the impression that the step, that the next step in production as far as the Government is concerned, was the file index step and at this point, the Government and Mr. Barr, too, I think, made it plain that we have not had the opportunity to thoroughly examine the utility of that step.

I can say to your Honor that we on the Government's side have found that technique, namely, the file index technique, useful in past cases and we hoped it would be useful here, but what we will do is, ourselves, take a look at these file indexes one by one and do our best to utilize them to take the next cut at production but the file indexes are coming in now and we had just thought that it would be helpful to IBM to have them immediately so they could start thinking about how best to utilize them just as we are thinking as to how best to utilize them, and that is the reason that the file indexes are being supplied as quickly as they are received, without any attempt to go back to the agencies and ask them for further detail.

We have not done that; we certainly will,

if that is an appropriate way of arriving at the descriptions that we need in order to find out where the files are that will produce the documents that IBM feels it needs to prove its case.

One comment on the matter of proprietary information.

It is commercial information, as Mr. Barr states, but there is a special problem, we feel, with respect to the federal system of procurement, in that there are some statutes, and I think I adverted to this back when we were last before your Honor, there are some statutes that cover the Government employees in their dealing with proprietary material that perhaps brings the material into a little different standing, as far as the Government employees are concerned, because they are subject to prosecution for improper and inappropriate handling.

The sensitivity of the material itself is greatest at the point of making the commercial decision for procurement and supply and it is particularly sensitive in this case, we feel, your Honor, because the materials that we are dealing with, the machinery that we are dealing with, is utilizable in many integral parts of Government operations; it's the heart of some of the very operations that the agencies of the Government conduct and,

for that reason, it goes directly to the operations of the agency itself; it's not a like the procurement of a typewriter, perhaps, at least as the Government agencies that are attempting to comply with it, so that we do feel that the protection of proprietary information is of a little stronger validity as far as the Government is concerned.

We would like to leave with your Honor the motion that we have prepared, the papers are ready to go, except for the affidavit of the general counsel of the Department of Defense, who has now signed his affidavit as of this morning, we learned by phone.

We would like to leave with your Honor and supply counsel with the papers, that have to do with the handling and safeguarding of classified and proprietary materials and we will undertake to substitute the signed and notarized affidavit that has been signed and notarized this morning at about 8:10, for the one that is part of the motion as it now stands but this is on the assumption that we will wish to come before your Honor very shortly for an order regarding classified and proprietary material.

The original, if I may hand these to the Court, is the top document and there is the copy for the

Court with it and those are the ones that will need to have the affidavit, the signed affidavit inserted or added.

I have nothing further for the record this morning, your Honor.

MR. BARR: Your Honor, I have here two gentlemen who I had planned would make presentations to the Court. I would like their presentations to be thought of as really, in effect, statements of counsel, not as testimony in any sense because of the problems that that might raise under the Clayton Act, but in view of my own plain inadequacy to explain intelligently to the Court the matters that these gentlemen are going to talk about, I would present them to the COurt as, in effect, making statements to be treated by the Court and by the parties as statements of counsel, given in effect the credence that one would give to the statements of counsel.

They are editorial types of presentations.

Of course, both of these gentlemen may be examined by the Department at whatever time they choose to do so in connection with this litigation.

The two gentlemen that are here are Dr. Herman Goldstine and Mr. Charles Gold.

I don't know what the Court wishes to do about lunch. We can start and break for lunch or we can do this after lunch, as the Court pleases.

THE COURT: I think we can start now and go for about 10 minutes and suspend for lunch and resume again at approximately 2:15.

MR. BARR: All right, sir.

How much time would the Court have this afternoon for that purpose?

THE COURT: That depends upon what awaits me when I return to chambers.

MR. BARR: All right, sir. I'll start, then, your Honor, with Mr. Charles Gold.

Mr. Charles Gold is a programming consultant to IBM, a graduate of Yale University. He is adjunct professor of computer science at Pratt Institute and he is going to talk from some charts that he has prepared to the Court on the question of what is electronic data processing and I encourage the Court at any time to interrupt Mr. Gold and ask any questions that occur to you.

THE COURT: I'll make a slight change in our arrangements.

We will suspend for lunch now. I think in

24 APRIL 72
RAY CARLE'S AFTERNOON PROCEEDINGS SPENT IN HEARING TESTIMONY OF IBM EXPERT CONCERNING HIS INVENTION OF COMPUTER. NO DISCUSSION (ML)

Production of chemicals and

(This is the document referred to as "Court's exhibit 2" in the May 10 transcript.) Page 132

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	)	Civil Action 69 Civ. 200

PROPOSED ORDER AMENDING AND CLARIFYING PRETRIAL ORDERS NOS. 2 AND 3

The parties having been heard, and the Court being duly advised, it is hereby

ORDERED, ADJUDGED AND DECREED that, in plaintiff's production of documents from Government files pursuant to defendant's pending and any subsequent request for the production of documents under the Federal Rules of Civil Procedure, and specifically including the pending production pursuant to Pretrial Orders Nos. 2 and 3, the following procedures shall govern the production and inspection until further order of this Court:

(1) Documents designated as containing sensitive commercial or proprietary information shall be made available for defendant's inspection and copying. Defendant shall take all steps necessary to prevent the disclosure of such documents or any information obtained from such documents to any person other than an attorney engaged in the conduct of this litigation and to persons assisting the said attorneys in the conduct of this litigation. Such documents and information shall be made available only to those persons

that counsel deems necessary in the conduct of the litigation, and all attorneys and all such persons shall be notified of the entry of, and the terms of this Order before they are permitted access to any such documents or information, and each such attorney and each such person shall agree not to use such documents or any information contained in such documents for any purpose other than for use in this litigation;

(2) Documents designated as containing classified information may be examined on behalf of defendant only by duly authorized persons who have the requisite security clearances necessary for an examination of such classified material. All such materials and any copies thereof will be handled by defendant under appropriate security conditions until declassification has been effected.

Dated at New York, New York, this 10th day of May, 1972.

s/ David N. Edelstein
DAVID N. EDELSTEIN
Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

Plaintiff,

vs. 69 Civ. 200

International Business Machines Corporation,

Defendant.

Before:

HON. DAVID N. EDELSTEIN, District Judge.

New York, May 10, 1972,
10:00 a.m.

APPEARANCES:

RAYMOND M. CARLSON, ESQ.,
Anti-Trust Division,
Department of Justice,
JOSEPH H. WIDMAN, ESQ.
GRANT G. HOY, JR., ESQ.

CRAVATH, SWAINE & MOORE, ESQS.,
Attorneys for Defendant.
F. L. O. SCHWARZ, JR., ESQ.
GEORGE B. TURNER, ESQ., of Counsel

-and-

THE COURT: Shall we turn to the next item on the agenda?

MR. SCHWARZ: The next item is a motion which the Government has made.

MR. CARLSON: Your Honor, may I just address myself to the agenda, for a moment, since, again today, I believe our time is going to be limited.

I had indicated, if you don't mind my saying so -- I had indicated at our last meeting that production at certain locations was awaiting the Court's decision and order as to the conditions under which the inspection should be conducted, and this is described in Item 3 on the agenda, and I would ask your Honor to consider taking that matter up next, because we are holding up production, and there is a Government paper that has been submitted, and a reply has been entered to that motion which, if granted in whole or in part, would permit us to get on with the business of inspecting at the various Government agencies.

It has been several weeks, and the agencies are starting to say, "When are you going to get to the documents?"

THE COURT: There seems to be a difference of opinion between you and IBM on this.

MR. CARLSON: Yes; there is, your Honor. If I may explain simply --

THE COURT: I had thought that you had resolved that problem, but apparently you have not as to two categories; is that correct?

MR. SCHWARZ: As to those two categories which relate to what the Government calls sensitive commercial and proprietary documents --

THE COURT: Shall we hear from Mr. Carlson first?

MR. SCHWARZ: Yes.

MR. CARLSON: I think I ought to go back a little bit and explain to your Honor what the Government has had in mind as far as the procedure to be followed which we on the Government's side have found to be helpful in cases where there is a mass of documents, Government documents to be produced. This is by way of explanation of how we came to the two categories that I think your Honor has just mentioned on the record.

Where there is a large group of Government documents involved in a central function of a Government agency, such as data processing, involved in a production under order, we have found that it is helpful to devise a method whereby the inspection can be conducted under conditions which permit us to make available documents which are both sensitive and proprietory in the Government files which are usually, and are in this case, a small percentage of the total materials

to be produced, so that once the documents are looked at and a selection is made, we on the Government's side and the inspecting party have a much smaller group of documents to direct our attention to, as far as the question of how to handle proprietary materials and materials which have been classified confidential, secret or top secret, for purposes usually of government security, security of government military operations or government operations that gather information, or other well-known government security reasons.

So that when I spoke to your Honor at the end of the last session that I thought these categories which are in the order that were submitted as categories 2 and 3 were acceptable to IBM, I was under the impression that that part of the Government's motion was acceptable.

Mr. Schwarz's position -- and I am sure he will correct me if I misstate it in any respect -- when I talked to him on Friday, after we both had had a chance to look at the order and make sure we had the order that we were both talking about, the same order, namely one going to the inspection of proprietary and classified materials, Mr. Schwarz advised us that he felt that he should not agree to the inspection being covered under these conditions.

In view of the fact that there were documents and records of IBM, as he claimed, that were in Government

possession that were proprietary and as to which his client, he alleged, had no protection, that is, that is what he said.

I undertook to explain to Mr. Schwarz, and I would explain to your Honor, that I think that the conditions are totally different, and I was not arguing, and I am not arguing with respect to proprietary and classified materials in this inspection that they are materials which must necessarily always stay proprietary or always stay classified, because we will immediately, as soon as we know which documents we know we are talking about, address ourselves to declassifying and to taking out from under any proprietary classification those documents which are selected.

But that, I think, is the reason that we came to your Honor today, without any agreed part of this order.

Shall I go on and explain what the rest is?

There are, I think, two groups of documents which do not fall within the types of things I have described. One group of documents in this motion and with respect to Pre-trial Order Number 2 is a group of documents that relates to the operations of the Department of the Navy, but we will find that as we go on into the other elements of the Department of Defense, that we will find the same kinds of documents.

We have spoken in terms of a category of documents that is found in the Department of Defense which we have

described in our moving papers as source selection documents. These documents are documents which the Department of Defense considers of the utmost integrity to its purchasing functions and to the national security, for the reason that the documents classify by group and by their various factors of efficiency, cost and other elements, the parties that are bidding on various major defense department contracts.

So we have attempted to set up a descriptive category to delineate such documents, and they are, compared to the total number of proprietary documents, relatively few in number, but they are documents that are generated at the rate of two or three a month in the Department of the Navy or perhaps twenty-five to thirty a year and are generated at the very highest level of source selection, which is in an area in the Defense Department which is specifically designated and delineated for examination of data processing equipment, bench marking data processing equipment, asking for bids on data processing equipment and classifying and categorizing the various efficiencies and the various elements of each bidder as they relate to the ability of that bidder to perform the contract.

The second category of documents that I wish to describe to your Honor are documents which we have labeled in our motion national security documents, and as to these,

when we received word from the National Security Agency and the Central Intelligence Agency that their data processing documents, that is, relating to the cryptological and other information-gathering functions, are of the highest national security interest and that they were not able to produce them because of statutes which prohibited their production, we asked the heads of these agencies to prepare affidavits as to the categories of records that the National Security Agency and the Central Intelligence Agency found to fall within the scope of Pre-trial Order Number 2 but which they were inhibited by the national security and by statute from producing, and there are attached to the motion an affidavit of Vice Admiral Noel A. Gayler, director of the National Security Agency, and an affidavit of Richard Helms, director of the Central Intelligence, which describe the categories of documents that are national security documents.

Included in that category, too, is a very small bulk, a limited number of pages, of documents that are falling in the same general category of very sensitive national security, that are within the breadth of the motion but are found in the files of the National Bureau of Investigation, and your Honor will recall that at our last meeting I referred to Mr. Hoover's affidavit as being part of the papers submitted in this regard.

I don't know whether your Honor has had an opportunity to read the papers or not, but backing up to describe more broadly the thrust of the Government's motion, it is this:

First, that we feel that IBM should take its cut at production of the documents that are available and which are all the documents called for by the motion, inspect those that are not covered by any proprietary and classified status, inspect those that are covered by proprietary and classified status under conditions that are described in the motion as our best efforts to safeguard the material without inhibiting IBM's ability to inspect and copy and decide which ones, if any, among those documents they shall utilize, and, finally, to put off the very few categories or areas of documentation that fall within this motion that go to matters of intense national security and which are found in the files of the National Security Agency and the files of the Central Intelligence Agency and in the files of the Federal Bureau of Investigation.

On the score of the last category, I would add to my prior thought that the fact -- I think it is brought out in Mr. Helms' affidavit -- that the data processing process or the data processing part of an information-gathering agency such as the National Security Agency or the Central

Intelligence Agency is the very heart of its operations under the present way that information gathering works, that is, gathering of all types of information from various parts of the world or wherever, relies in this day and age so heavily on data processing, that the data processing operations are in those agencies at the heart of the function.

I think one final word in support of the Government's position here. I think this is a usual and an often applied way of going at the problem of this kind of production, both in major private litigations, where the great bulk of documents are involved, and I think we have cited to the Court some authority for the fact that this is a feasible and a permissible way of taking a cut at production of the documents and that the initial safeguards that we have devised are those that we feel, giving our best attention to the problem, are best devised for permitting the defendant to begin its inspection of documents and begin developing its case and getting along with the business of the production that is going to have to be forthcoming in this case, but without facing at this point questions which we on the Government's side feel that may disappear or can be otherwise resolved by stipulation or otherwise or may prove to be cumulative or may otherwise be resolvable as the case goes along.

May I add one word to that, your Honor.

It is also intended, as the Government's paper show -- Well, it was intended to present to your Honor an order that hopefully -- and the order is attached to the papers; I think it is the last of the group of papers that were submitted together -- it was our best effort to draft an order that would apply to not only the production that we are involved in in Pre-trial Order 2, but to the production that may be involved in subsequent responses to IBM's request for subsequent orders of this Court as to production of documents from Government files, so that it was drawn with a breadth that may be slightly broader than the problems that are just now before your Honor, but in an attempt to anticipate some of the problems that we expect will come up as we go through to other agencies that IBM has told us that they are interested in.

MR. SCHWARZ: Your Honor, if I may first deal with the portions of the order that relate to documents they seek to product under conditions and then turn to the question of the documents that they wish to withhold altogether, because I think they raise very different problems:

With respect to the documents the Government seeks to produce under conditions, the paragraphs that are relevant in the Government's proposed order are Paragraphs 2 and 3.

Court's Exhibit No. 1

Pages 95 - 116 discuss the handling of "classified" and "proprietary" documents.

THE COURT: So you have no objection to any of the items set forth in this proposed stipulation?

MR. SCHWARZ: 2, 3 and 4.

THE COURT: Do you have any objection to 1?

MR. SCHWARZ: Yes. 1 takes some explanation. 1 relates to the documents that the Government wishes to refuse to produce altogether. In particular, I would like to discuss with your Honor the source selection board documents which Mr. Carlson referred to first in his argument.

The Government's paper refers to the source selection documents as those documents which particularly reveal the "purchasing policy considerations and opinions and comparative rankings of prospective vendors in terms of cost performance and other criteria."

The Government seeks, as I say, to withhold those altogether. These documents, as I will explain in a minute, are ones which the department previously had admitted would be relevant to the case and would be helpful to the defendant in preparing its defense, as I will explain in a minute.

Mr. Thorman, as far back as November 1970, specifically referenced these particular documents and said they would be produced and that they would be helpful to the defendant.

What we would like to have ensue from today's session is a briefing schedule in which your Honor would ask for

briefs from the department and us on this, what is a very, very basic and fundamental issue of perhaps constitutional proportions, where the department as a plaintiff, the United States Government as a plaintiff is coming into court and asking that the court issue an order exempting from discovery altogether documents which have been admitted to be of the highest relevance and which have been admitted to be helpful to the defendant.

There are cases, as will emerge in the course of the briefing schedule, that indicate that in such circumstances under Rule 37 the Court may issue an order either dismissing the action or requiring that the Government admit certain facts with respect to the documents.

Now, if I may turn to the statements previously made by the department with respect to these very documents, as the Court will recall from the discussions we had in a number of earlier pre-trial conferences, we served upon the Department of Justice our draft document demand first in January 1970, and we made that demand formal without change in October of 1970.

On November 12th, Mr. Thorman --

THE COURT: What year?

MR. SCHWARZ: 1970. Mr. Thorman, who is Mr. Carlson's present superior, still on the case, and who was

then in charge of the case full-time, sent to me and filed in this Court --

THE COURT: Is Mr. Thorman still on this case?

MR. CARLSON: He is in general supervision of this case, yes, your Honor.

MR. SCHWARZ: The reason we know that is the correspondence contains Mr. Thorman's initials. Mr. Thorman filed with this Court and sent to us the Government's formal response pursuant to Rule 34, which I am going to hand for your Honor's convenience a copy to your Honor.

On page 1 of the response, the Government stated that in responding to our document demand, it would -- I am reading now from the third paragraph of the first page -- "direct its efforts to production of documents relating to the procurement and use of electronic data processing products."

END

T2PM

THE COURT: I think, by way of more explicit identification, you are reading from the third paragraph, second line; is that correct?

MR. SCHWARZ: Yes, it is, your Honor.

As you will see, counsel for the government then went on to state that procurement type files contain an analysis of computer equipment considered, including prices, capabilities, capacity of the supplier, and similar conditions relevant to each purchase decision.

Then skipping down on page 2, your Honor, to about the middle of the pager, after government counsel described certain kinds of files, the response states:

"In terms of file categories the above steps A, B and D" -- and that relates to steps taken in the government's procurement decisions -- "are usually documented in what may be termed source selection files."

Now, it is those files --

THE COURT: Close quotes. Only "source selection" being in quotes.

MR. SCHWARZ: Source selection, single quotes; files, close quotes.

It is those files which the govefnment now proposes to refuse altogether to produce.

On page 3 of the same document, Mr. Thornan

reiterated precisely, referring to the files now at issue, "Plaintiff proposes to start, subject to agency concurrence, with source selection files, central contract files" -- and then certain other files of the GSA and of the Department of Defense.

On page 4, Mr. Thorman stated at the commencement of the second full paragraph:

"While plaintiff is willing to undertake the extensive project outlined above, it must resist" further portions of our demand.

Then, finally, turning to the final page of the response under the heading "conclusion," it is the seventh page but it is not marked with a number, under the heading of "conclusion" the government concluded its response to our document demand by stating -- reading from the second sentence -- "Plaintiff is probably the largest single user of the products involved in this litigation, is willing to assume that it may have information gathered as a purchaser and user of such products which could be useful to the defendant in preparing its defense."

Now, after we received that response from Mr. Thoman, I wrote him and said that it is satisfactory to us that you start with the procurement and use and the source selection files that you specifically designated; we will

reserve our rights with respect to other files.

Mr. Thorman wrote me back saying that is satisfactory with the government; just as you reserve your rights to produce other files, we reserve our rights to object to other files But it was clear, perfectly clear, from the government's response that they intended to produce the source selection files. Indeed, those were the files which had been highlighted as relevant in the government's response.

THE COURT: Do you wish to mark these for identification at all?

MR. SCHWARZ: They are in the court file.

What does your Honor wish me to do?

THE COURT: It is entirely up to you.

MR. SCHWARZ: Would it be helpful if I marked them?

THE COURT: You have been talking about very specific documents, one a letter dated July 21st, and then again a response dated November 12th, both in the year of 1970, and you have extrapolated portions which you have spread on the record. Perhaps it would be helpful if you marked these for identification.

MR. SCHWARZ: Should we start with new numbers or continue with the series of numbers that we had from the last time?

THE COURT: I think perhaps continue with the

series of numbers that have been in progress, unless you feel that this should start a new series of some kind.

MR. SCHWARZ: Let's continue.

Will you mark as IBM's Exhibit F for identification a letter dated July 21, 1970, from Mr. Richard W. McLaren by Burton R. Thorman to myself.

XXXX (Defendant IBM Exhibit F marked for identification.)

MR. SCHWARZ: Would you mark as IBM Exhibit G for identification a one-page letter dated November 12, 1970, from Richard W. McLaren by Burton R. Thorman to me, together with an eight-page attachment headed "Response to Defendants' Requests for Documents."

XXX (Defendant IBM Exhibit G marked for identification.)

MR. SCHWARZ: Our request, your Honor, is that this being an issue of significance, the refusal by the government to produce documents which presumptively, based upon their own statements, are at the essence of the lawsuit -- our request is that we set a briefing schedule which is commensurate with the significance of the issue, and that then at some time set by your Honor we have argument with respect to the government's position on these documents.

Moreover, if I may add just one other thing, as

described in the government's current request in which they describe these as being intimate documents relating to the evaluation of the computers and as described in Mr. Thorman's initial response, it is clear that these are documents of the greatest significance so that proposing that the whole question of these documents be put over and delayed is one that deprives the defendant of the right to get at the documents which would be of the greatest significance in preparing its defense and, indeed, might conceivably make other discovery of lower level documents not necessary.

THE COURT: What effect, if any, do you think G for identification should be given?

MR. SCHWARZ: In my opinion it is binding on the government, your Honor.

THE COURT: You would think that this is in the nature of a stipulation?

MR. SCHWARZ: It is in the nature of an answer to the motion. It has the same effect, it seems to me, as any other court paper in which a party takes a position.

I think it is entitled to greater weight than a stipulation in that it was filed as a response with the Court.

THE COURT: Are you also claiming then that the proposed order, filed May 1, 1972, in its first paragraph is

a change of position from that set forth in the response in G for identification?

MR. SCHWARZ: I think there is no question about that.

THE COURT: I think there is an additional sentence which perhaps should be incorporated in the record, since you read from the paragraph captioned "conclusion," the last sentence of the first paragraph: "The foregoing plans to produce documents are made with that in mind, and plaintiff reserves its right to object to any further calls by defendant under this request."

MR. SCHWARZ: Yes, I think that is helpful to our position.

THE COURT: I don't know whether it is helpful or not. That is not what I have in mind. I merely thought that that sentence should be pointed out since references were made to that paragraph under the caption and for purpose of completeness I think that that should be included.

MR. SCHWARZ: Yes. They make the same reference in the paragraph on page 4 that I did read in which they stated, and I quote, "While plaintiff is willing to undertake the extensive project outlined above it resisted . . . other portions of the demand."

THE COURT: That is paragraph 3.

MR. SCHWARZ: The second full paragraph. Or you could look at it as the third paragraph.

THE COURT: Yes, the second paragraph is correct.

MR. CARLSON: May it please the Court, the two documents that Mr. Schwarz has presented to your Honor to look at represent a very small part of a story that the upshot of which was represented to your Honor when we first came to this court, a total disagreement as to any way we could get at production through the technique that was undertaken in the document from which Mr. Schwarz read.

If we are going to make a record on this, we are talking about fifteen or twenty letters and a lot of business back and forth, but the government's position is simply that there never was any agreement in this document.

All IBM says to the government is "go ahead and do what you want to, but don't think we will agree with it."

We said to your Honor at the outset that we had an open-ended motion that called for what we thought was every document in the world, and that there was no way to get to it, and I did not come prepared to make a record on that point today.

I just wanted to remind your Honor that we feel very strongly and differently from what Mr. Schwarz has

just represented to you.

THE COURT: You may feel very strongly, but I don't think I have avery clear explanation from you as to the meaning of G for identification and the response contained therein, but I think we can leave that for a later time.

MR. CARLSON: Excuse me. Let me get to the specifics, your Honor.

I have not taken the position, and I do not take the position, that source selection files are not covered by the response. They are covered by the response to Pretrial Order No. 2, and many of the documents that are being responded with are from the source selection files.

The classification of documents that Mr. Schwarz identified at the outset is called a source selection evaluation document. It is a document the government generated, a very specific document which pulls together the proprietary information, much of it, that Mr. Schwarz and his inspection crews will inspect and, I assume, they will copy, much of which we admit is relevant to his claim ed cut at this production and which will be produced.

The one type of document that we are talking about here is a major source selection evaluation report prepared at the highest level by the government authority in response to and in accordance with its statutory requirements and

responsibilities for purchasing at the lowest possible cost on the basis of the evaluation of very complicated factors on a very precise basis, the access to which would give this, what we claim the dominant competitor, such a tremendous advantage in procurement and in access to information as to government studies of the relative merits of data processing equipment that the Defense Department considers it of the very highest relevance and security to its purchasing, your Honor.

THE COURT: Let's see if we can deal with this problem on a practical basis, for the time being at any rate. First, I would like this proposed order marked for identification so that I can refer to it more easily.

XXXX

(Court's Exhibit No. 1 marked for identification.)

THE COURT: Court Exhibit No. 1 for identification would certainly appear to be at the bottom of the totem pole of documents to be reached or to be concerned with. Would you all agree to that?

MR. SCHWARZ: Respectfully, your Honor, I think we should commence with the other documents and get them produced, but I don't think we ought to regard this as at the bottom of the totem pole.

THE COURT: There are so many documents involved

that certainly this does not require any immediate resolution. Would you agree to that?

MR. SCHWARZ: I certainly don't think it requires immediate resolution. I think if we could set a schedule --

THE COURT: I would agree to the briefing schedule.

I would also indicate that in any event should these documents be of the kind which it is deemed necessary as having some bearing on the defendant's case and should be considred as documents that ought to be discovered by the defendant, before any action is taken this Court will examine these documents in camera.

Do you understand?

MR. CARLSON: I understand that, your Honor.

THE COURT: First, we are going to have a briefing session and deal with the legal problem. There is a huge body of law in this area about the executive or statutory privilege. Then, if we reach that point, before any document would be turned over, there would be additional considerations, and before any ruling is made the Court would examine the documents involved in camera, and should the Court decide that they are of the kind involving intense national security and should not be revealed under any circumstances

those documents would be impounded and preserved under a secrecy ruling.

MR. SCHWARZ: We then have a further legal question on what rights the government then has to proceed.

THE COURT: Precisely. Or what remedies flow.

MR. SCHWARZ: Yes, sir.

THE COURT: Or what application would be viable, or what relief may be indicated. But that is at the moment going up the pyramid.

I would think that Court's Exhibit 1 for identification has been resolved on all subject matter set forth there with the exception of 1. Is that clear?

MR. CARSON: Yes, sir.

THE COURT: So, if you will be good enough to submit to me a stipulation, which I now think can be on consent, as to all the items resolved, we can dispose of that.

Did you wish to confer with Mr. Widmar for a moment?

MR. WIDMAR: If I could, for just a moment.

THE COURT: Surely.

(Pause)

THE COURT: I don't know on what you conferred, but I was going to finish my thought by saying in view of

the need for what you have suggested is speed, you can go down to the reporter's room and have the proposed stipulation redrafted, excluding No. 1.

MR. CARLSON: Excuse me, your Honor. My colleague points out to me that that is the very thing that we did have and brought to your Honor on Friday of last week, and that we had already done that.

MR. WIDMAR: Off the record.

(Discussion off the record.)

THE COURT: Is this the one?

MR. WIDMAR: Yes.

THE COURT: Wasn't this the one to which you had some objection?

MR. SCHWARZ: Only on the ground, your Honor, of their not covering themselves, and we discussed that previously, but might I just take a look at this for a minute?

MR. WIDMAR: Your Honor, what that one does is takes the same language and takes 2 and 3 and makes them 1, and 2, so it would make a new order by its leaving 1 to be resolved at a later time.

THE COURT: Would you examine that?

MR. SCHWARZ: I have, your Honor, and that is satisfactory to us. We will try and take care of the problem

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of our documents pursuant to the earlier discussion.

THE COURT: There is no objection to this at all?

MR. SCHWARZ: "This" means?

THE COURT: Mark this Court's Exhibit 2.

XXXXX

(Court Exhibit No. 2 was marked for identification.)

THE COURT: I am going to take a brief recess.

(Recess.)

MR. SCHWARZ: We ought to, yourHonor, agree on a briefing schedule.

THE COURT: What about 2 for identification? No more questions about that?

MR. SCHWARZ: No more questions.

THE COURT: Now, the briefing schedule.

We have completed the agenda, haven't we, for today?

MR. SCHWARZ: I believe the government has another motion they indicated they wanted to argue, which is the so-called waiver of privilege.

THE COURT: Yes, that is right. Shall we touch upon the briefing schedule now and I will dispose of that?

MR. SCHWARZ: The government indicated in their papers that they wanted to put in additional papers, and that these were -- correct me if I am wrong, Mr. Carlson --

but that these were on the subject to be taken as preliminary papers, and, therefore, I think you ought to file the first brief.

MR. CARLSON: I have a couple of things to say about that, if I may, your Honor.

It was our judgment that this is not the time for a briefing schedule, and there are a number of reasons set forth in the papers that we submitted and your Honor has alluded to several of them, namely, the difficulty of finding a remedy for the possibility that other things may happen in the course of this lawsuit, but one in particular --

THE COURT: I don't think I stated that any other things may happen in the course of this lawsuit. That is certainly not my language.

MR. CARLSON: My language is too broad, your Honor, but your Honor had alluded to some facts that might affect our ability to attend ourselves more closely --

THE COURT: I don't think I intended that, either.

MR. CARLSON: In any event, I apologize if I have misstated or misrepresented what your Honor stated. I am trying to state myimpression of it.

Counsel for the defendant stated several moments ago that he would submit some stipulations which go to the

substance of some of the things that we on both sides had anticipated IBM would undertake to try to prove from various government agencies. Those stipulations, or proposed stipulations, may be one technique that can either avoid the problem of confronting the national security matters head on or, at least, narrow the problem of the national security matter, and that is a reason additional, or part of one of the reasons stated in the government's papers why I would urge to your Honor that the time is premature to set a briefing schedule as to the substance of the privilege itself.

It was the government's intention to present to your Honor and argue to your Honor that the problem with these documents, and they certainly will be held for future production, it will be better attended when we know how many documents and what documents of all kinds are covered by the national security questions, andthat in itself we don't feel certain has been determined at this time because we are addressing ourselves right at the front end of the second production and there may very well be some extremely sensitive documents.

What we are urging upon your Honor is that we set this aside, as I think your Honor can do in his discretion, for the time that we all have a little more familiarity with

the issues that we will eventually try, we will all have a good deal more familiarity with the facts that can be stipulated because they are not challenged by either party, and we all have a great deal more familiarity with the areas of discovery that have yet to be explored.

So my point to your Honor would be that the government feels that a substantive hearing on the national security question is premature at this time, as it also believes a substantive briefing schedule and argument schedule on the source selection evaluation documentation is premature at this time, because we may be able to do a more precise job, and we think we will later on in the lawsuit. We don't think anything will be lost by waiting.

MR. SCHWARZ: There are a number of things that are lost, your Honor. First, if these are, as the government describes them, the documents which best reveal why the government has made various purchasing decisions and how it evaluates the computers of IBM and itsemany competitors, then we have, for example, when we come to the question of depositions a situation where the government is, in effect, asking us to start taking depositions of government personnel without having the documents which best reveal why they did what they did.

Now, to make clear our belief, which we have

followed from the beginning in the discovery in this lawsuit and argued before Judge Bryan way back in 1969, when he ordered the government to answer our interrogatories going to what the government's computer equipment is and who competed -- our belief is that we will establish a complete defense to this lawsuit by the documents that we discover in the government's files, that we will establish the competitive nature of the market, that we will establish the definition of the market, that it is far broader than the seven-manufacturer market which the government seeks to come forward with in this Court, that we will establish the excellence of IBM as a faithful and good quality performer, that we will establish with respect to the practice issues, each of the practice issues, that government employees specifically requested IBM to do the things which in the complaint the government has alleged are monopolistic practices.

So, we are dealing with an issue and a defense which is at the heart of our defense, and these documents, particularly the source selection documents, which Mr. Thorman identified as long ago as November 1970, and which Mr. Carlson's papers themselves reveal as being at the essence of the importance of the decisions made by the government, are extremely important documents , and post-

poning those beyond the time necessary to present the issue adequately to your Honor would slow down the lawsuit, would result possibly in carrying forward a lawsuit which at the end the government, if it continues to refuse to produce these documents which are relevant to our defense, under the cases I believe the government would find that it cannot proceed in the posture of the plaintiff on the one hand, and, on the other hand, taking the executive right to withhold relevant information from a defendant.

So this is a legal issue which is of the utmost importance, and these are documents which have been already described as most important and very relevant documents.

THE COURT: Aren't you almost saying that the documents in category No. 1 in Exhibit 1 for identification are the documents upon which you rely to defeat the government's lawsuit and really the others may be cumulative or at best unnecessary?

MR. SCHWARZ: I don't think I would go quite that far, but I am saying that if they are described as the government has described them for the particular procurements in issue are the most important documents, yes, your Honor.

THE COURT: Well, there is a difference between most important and the documents upon which you may rely exclusively to defeat this lawsuit.

MR. SCHWARZ: I cannot say without having seen these and the other documents that I could rely exclusively on these. I cannot take that position.

THE COURT: Is it a fair assumption that you will not be able to rely exclusively on those as your total defense?

MR. SCHWARZ: It is a fair assumption that there are other documents which will assist our defense.

THE COURT: And is it a fair inference that you would not be willing to abandon discovery of all the documents enumerated in the other categories even if you were to obtain the documents at the moment not ruled upon in category 1 in Exhibit 1 for identification?

MR. SCHWARZ: Clearly correct, your Honor.

THE COURT: Then why cannot you proceed with the other categories?

MR. SCHWARZ: We can, and I suggest, indeed, that we should, proceed with the other categories, but that since these are important documents, and the legal issue is very important, that we not just postpone forever, as the government wishes to do --

THE COURT: It won't be forever, because I regret to say that neither of us here, despite the disparity in age, have any right to look towards eternity or

immortality.

MR. SCHWARZ: I think we share that.

THE COURT: Don't we have to cross another threshold perhaps before we get to the briefing session, one that has not really been mentioned. Aren't we quickly reaching that point in time where it would be necessary for each of you to define the ultimate issues, at least tentatively in the first instance.

MR. SCHWARZ: As your Honor will recall, you asked that earlier, and we tentatively attempted to state our view on the issues, recognizing that that was very much of a first instant statement.

The government came in, as you will recall, with a single piece of paper that covers only one of many issues and doesn't elaborate, and I think it would be very useful to have the government do what in effect we have already done.

THE COURT: I consider the first nothing more than really a preliminary warmup. I think we now proceed to a more decisive attempt at defining the issues as prescribed by the manual.

I think we ought to think about that because we are talking about today when depositions will be taken, we are talking about briefing, and I think we are at the time

when we ought to seriously consider a definition of tentative ultimate issues, including the relief sought.

What does the government seek? What does the government want in the event that it prevails?

I am not unaware that very often the decree takes almost as long to prepare as the trial, and that even an indication of what the government seeks by relief at this time would not preclude an extensive effort in the event the government prevailed as to what kind of relief it would be entitled to. I am not ignorant of that at all.

I think before we talk of a briefing schedule at this time I would like to talk about what I consider necessary now, and the time has come for a definition of issues. I mean a careful, precise, meticulous effort.

I hope this doesn't turn out to be the kind of a problem that I had in an antitrust case where after many attempts were made to get the parties to consent to tentative ultimate issues the Court had to frame all the tentative issues sua sponte, which was attacked by an application for mandamus and which was the subject of law review articles. I would hope that you can meet the challenge of the manual, and follow the mandate of the manual by agreeing to tentative ultimate issues. And, to the extent that no agreement is possible, where you cannot compose your

differences of opinion or resolve your different views, that will be the opportunity for further pretrial hearing and, indeed, the Court might have some questions over as to those issues that you agree upon.

MR. SCHWARZ: I think one enormously helpful first step --

THE COURT: I would certainly hope that you do not decide to submit tentative ultimate issues by merely retracking and fragmenting the complaint and the action, and merely recapitulating it or changing the language somewhat. This is not what I am talking about.

MR. SCHWARZ: One enormously helpful step, your Honor --

THE COURT: Perhaps you might take a look at Life Music in that regard. There three or four efforts were made by counsel to formulate tentative issues, and, unfortunately, all they seemed to be doing was juggling the complaint and juggling the allegations therein and the answers thereto, but I decided that that was not a compliance with a request for a definition at all.

When do you think you are ready to start that effort?

MR. CARLSON: I had suggested to your Honor earlier that we start that very soon, or immediately. I

think the time is now.

THECOURT: I think so, too.

MR. CARLSON: May I amplify a little bit on my thoughts on the issues? In one proceeding in this court before Judge Dawson in the block booking cases in this area, we found it very helpful there to negotiate the issues between the parties bite by bite. That is, try to establish an area of issues to take the first cut at and draft on one side the government's issues, submit them, confer about them, have the other side draft a set of counter issues or counter proposals, draft from that and confer, and we did this over a period of altogether about four and a half months in the block booking cases, and we came to a schedule of issues upon which the cases -- and there were six of them consolidated before JudgeDawson -- were ultimately tried.

I recognize it is a very difficult task in an adversary proceeding, but I think this is the most useful way to address this kind of a case at this stage, for counsel to sit down and to bring to your Honor from time to time -- and I would say maybe every month or so at a regular pretrial -- an area of issues that we have addressed ourselves to by drafting and by meeting, and tell your Honor where we stand on them and what the problems are, and where discovery is

needed to amplify the areas of problems, until we have reached the point where we can have as close to agreed schedule of issues to try as is humanly possible, and, hopefully, that is the total issue in the case.

THE COURT: Do you see any objection to that proposed procedure?

MR. SCHWARZ: No. I think that proposed procedure makes sense.

I have two oblique comments to it. One is that it seems to me the most useful area to start with is the question of the definition of the market and who the government claims competes.

You have our definition of that from the census we have taken in the private cases, and if you could tell us what suppliers you believe compete with IBM that would be helpful, and what equipment competes with IBM.

The only other comment I have is a practical one of scheduling. The Greyhound trial, which Mr. Barr and I will have to attend and try, starts on the 23rd, and we are going to Phoenix on the 15th.

THE COURT: The 23rd of this month?

MR. SCHWARZ: Of this month. So as far as our participating in this, we won't be able to do that until some time around the 1st of July, because the trial is about a

six-week trial.

THE COURT: You won't be available during this period at all?

MR. SCHWARZ: I will be in Phoenix, your Honor.

THE COURT: That means you will not be available in New York.

MR. SCHWARZ: That is right.

THE COURT: Do you have anybody backing you? I don't mean necessarily with reference to the framing of the issues, but for other matters?

MR. SCHWARZ: If there are other matters we certainly can have somebody, if there is an emergency matter that needs to be brought before you. There will certainly be people available to come.

THE COURT: You are going to keep in mind that you are going to attempt to define documents which you consider to be proprietary. You will bear in mind, will you, that Mr. Carlson has indicated that there may be some imminence in their need to reveal some of these documents.

Now, in the event any matter concerning that, or for that matter anything else in this case that requires immediate action, would you have anybody?

MR. SCHWARZ: Yes, I will.

THE COURT: Acting in your behalf?

MCMD 1.6

MR. SCHWARZ: Yes.

As I told Mr. Carlson, Mr. Waygood, whom your Honor met in February, I think, at one of the earlier pretrial conferences, is going to contact Mr. Carlson on that subject.

THE COURT: Mr. Carlson, in the discussion on the matter of briefing, there was something indicated about your submitting proposed stipulations. I am not at all sure that I am clear about that.

MR. SCHWARZ: I believe I know what he meant. He submitted to us some time ago some draft stipulations with respect to the government's position on some of the issues, and we as part, really, of this same process of defining the issues to the extent the parties can agree on stipulations, that is really the same thing as agreeing on the definition of the issues, although he goes a little step further, he says the government would admit certain things instead of saying here is an issue which should be tried by the Court.

THE COURT: I certainly have no objection to accepting admissions.

MR. SCHWARZ: If they give us adequate admissions, I have no objection to that.

THE COURT: We still have on motion open, do we not?

MR. CARLSON: We do, your Honor.

THE COURT: Before we tend to that, is there anything that you foresee as necessary on the next agenda in the immediate future -- that is, before you go on to Phoenix for your Greyhound case?

MR. SCHWARZ: I don't have anything in mind, your Honor.

THE COURT: Now, how long would this argument on the waiver of privilege take? I have eight cases coming in starting at four o'clock. Some are already here.

MR. CARLSON: I would think, your Honor, we would not be able to do justice to the record in the next five or ten minutes or so. Although we have some problems that stem from and are related to the waiver question, I think from the government's standpoint that we would prefer to come back at some time convenient to your Honor.

THE COURT: That is fairly urgent, would you indicate?

MR. CARLSON: Well, the resolution of several fallout questions has to do with our ability to prepare for and participate in the depositions that are now going on because we feel we do not have the documents that we need.

THE COURT: Can you come back some time this week?

MR. CARLSON: Yes, your Honor, if your Honor can see us.

Would it be helpful to your Honor if I indicated perhaps twenty to thirty mintues from the government's standpoint would be enough?

MR. SCHWARZ: I ought to be able to reply in twenty minutes.

THE COURT: Friday at eleven o'clock.

MR. CARLSON: That is quite satisfactory.

MR. SCHWARZ: Thank you.

THE COURT: If you have any further papers to submit, would you do that?

MR. SCHWARZ: On that subject?

THE COURT: Yes.

MR. SCHWARZ: You have from us our papers.

THE COURT: If you wish to submit further papers, I will receive that Friday morning.

MR. CARLSON: Thank you, your Honor.

THE COURT: I think we have covered a good deal of ground today. Don't you?

MR. SCHWARZ: We have, indeed, your Honor. Thank you.

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As I told Mr. Carlson on the telephone on Friday, and as I indicated in sending the agenda to your Honor, I have no problem with the substance of those paragraphs. Paragraph 2 --

THE COURT: Is that the document which was filed May 1st? Is that what you are talking about?

MR. SCHWARZ: Do you know when your document was filed?

THE COURT: Is this the document you are talking about?

MR. SCHWARZ: Yes; it is, your Honor. I am now seeking to refer to Paragraphs 2 and 3 of that Government filing.

CT Exh. B.Y No. 1

As I say, I have no objection -- IBM has no objection to Paragraphs 2 and 3. Paragraph 2 provides that documents which are sensitive commercial or proprietary shall not be disseminated other than to attorneys and people assisting the attorneys. That is the procedure which we in fact have been following, in any event, in the private cases and, indeed, with respect to any material we have received in the litigation.

The problem I have only arises from my telephone conversation with Mr. Carlson on Friday, in which I said to Mr. Carlson that in our view the same sort of restriction of

course should apply to the Government with respect to the commercial and proprietary documents which we have produced to the Government.

Mr. Carlson's response to that is, "Well, the Government already has the documents which IBM has produced, and therefore the situation is distinguishable." That surprised me very much, and I went back to look at my files, and Mr. Carlson apparently therefore feels that the Government ought to be free to take the documents which IBM delivered to the Government in the course of the last several years and show those to persons other than the lawyers and persons assisting the lawyers.

Mr. Carlson's remarks surprised me, and I went back to look at my files. If I may hand to your Honor and to Mr. Carlson a copy of a letter dated July 21, 1970, written to me by Mr. Thorman, who is Mr. Carlson's predecessor in charge of this action --

I had, one month prior to that letter, at the time of our first production to the Government after they commenced the lawsuit, the first major production, proposed to Mr. Thorman a stipulation in which both sides would agree that documents produced in the course of the lawsuit would be limited, as is the normal practice, to attorneys and people working for attorneys and not just generally shown to out-

siders.

Mr. Thorman, as you will see from the letter handed to you, wrote me back, stating that he had only problem with my proposal, which was that the department to feel free to show to the superiors within the depart any document which they received in discovery, and, of I had no problem with that.

Then he went on to say, as you will see from third paragraph, which I may like to quote into the re here --

THE COURT: The third paragraph of the letter dated July 21, 1970, over Mr. Thorman's signature?

MR. SCHWARZ: Yes.

"Aside from this consideration, it is not the policy of the Department to disclose to persons not connected with the litigation the contents of any ment submitted to it, either in the course of an lit igation or during discovery proceedings, except as of a court or administrative proceeding, unless the party which produced the document authorizes the de ment to do so."

Until my telephone conversation with Mr. Curtis on Friday, I had been under the assumption and relying the statement from the man in charge of the Government

suit that the Government was going to limit itself in the use of our documents in the same way as Paragraph 2 of the proposed order asks IBM to limit itself with respect to the documents which the Government produces to us.

So in light of that history, and in light of what the normal practice is, I cannot understand why the Government is not willing to have the same restriction applied to it.

THE COURT: Is that what you indicated or had in mind when we closed our session on Friday, when I think you said for the record that you and Mr. Carlson thought that you had an agreement, and later, when a document was submitted for signature, after studying it, you indicated that that did not embody your understanding?

MR. SCHWARZ: That is not what I had in mind. What I had in mind, then, the Government's proposed order handed to us in Court last week is different from the language in the notice of motion, but it is not different from the proposed order which they had at the bottom of the proposed notice of July 1st.

That is not what I had in mind. It was only during the telephone conversation with Mr. Carlson on Friday that this problem came to light. I had not anticipated such a problem.

THE COURT: Does that complete your statement of objection?

MR. SCHWARZ: With respect to Item 2, yes. Item 3, which is classified documents, I have no problem with the Government's proposal that we should obtain appropriate security clearances. I do have a different class of arguments with respect to Item 4, which they wish to withhold altogether.

It might be useful to have from the Department any reason why they are not now willing to comply with Mr. Thorman's letter and have that part of the Court order.

MR. CARLSON: Does the Court wish me to address myself to that, your Honor?

THE COURT: Yes.

MR. CARLSON: As I understand the thrust of Mr. Thorman's letter, it does not differ from what my position is. I am going to state it to the Court.

In the course of proceedings such as the instant proceeding, we, the Department of Justice, are not in the business of data processing, as your Honor well knows. We feel it not only helpful but absolutely essential to an understanding of what the materials are that we receive in the course of preparing for trial to be able to discuss these materials with prospective witnesses, to attempt to understand

their meanings by using them in the preparation of witnesses that we intend to call, and we feel that this is precisely in the course of our duties in getting ready for a trial, in obtaining the facts to present the truth of the Government's case to this Court and that the only way we can do that -- and that is directly in the line of preparation for a trial -- is to have access to and use of the documents that are produced to and obtained by the Government for the very purpose of putting together its case and proving its case.

If that is what is intended by this paragraph, I agree with it.

I should also comment on this subject that we are very concerned about any protective order that is entered without the consent of the Court. As your Honor may recall -- I am not sure; I thought I mentioned it to your Honor on the last occasion before you, that we are governed in these proceedings, in public-interest proceedings such as the United States has brought here, by a publicity in the taking of evidence act, which evinces the policy of Congress.

For the record, I will quote it. It is 15 USC Section 30, which required that the proceedings in these cases be public.

So that we feel it incumbent upon us to respond to requests for security treatment, as far as our opponents are

concerned or as far as anyone is concerned, that relates to a court proceeding in the context of an application to the Court and a response to the Court and a finding by the Court that there is a need for the particular relief involved, and I don't mean to say by that that there is no circumstance under which the United States agrees to orders that will protect proprietary material by a party defendant. There certainly are those circumstances. But I do not feel that those are circumstances that apply to every document obtained from a defendant or that it is our judgment that should render a document of the party opponent proprietary. Rather, it should be the judgment of the party opponent that identifies the documents that are sensitive and by direction to us and upon motion that we present to the Court the question of whether or not the overriding interests of protecting the parties' proprietary information shall overcome the policy of these proceedings insofar as they are required to be public.

So that my concern with Mr. Schwarz's position is that I cannot -- and I don't feel I could, anyway -- agree that we were in what I took to mean a quid pro quo situation. I do not feel that. I urge upon your Honor that we are in a totally different position. I do not urge upon your Honor that there are not or may not be proprietary documents as

to which IBM may want protection and as to which when they tell us which those documents are that we may advise your Honor, to the best of our ability, that we agree that those are documents that need and deserve protection.

MR. SCHWARZ: I am troubled by that. What Mr. Carlson is saying is now that he has trouble with my position but that he is renouncing and ignoring the position that Mr. Thorman took, the man in charge of the lawsuit prior to our production of documents.

This is a flat statement that it is not the policy of the department to disclose to persons not connected with the litigation the content of the documents.

MR. CARLSON: That is true. We do not disclose. But we do use them in our preparation, and we feel that is a part of our duties. There is no disclosure as such, that is, disclosure to be disclosure. The disclosure is in the context of our duties, and we do not permit people to walk in off the streets or to apply to us to see these documents, but we do use them ourselves in our preparation, in our information gathering in the preparation, for the preparation and trial of these lawsuits, and we do that in this case and in all other cases, and we feel there is no other way that the Government representatives can discharge their duties to learn the facts and present the facts as they find them

and as they see them.

THE COURT: I must separate some of the language from what you may be trying to say. I am not sure that I understand you clearly. Are you saying that you don't want to be proscribed by any language from exposing proprietary documents to any outsider for the purpose of obtaining assistance, either by way of expertise or information in the prosecusion of this litigation? Is that what you are saying?

MR. CARLSON: No. That is not what I am saying, your Honor. I am saying --

THE COURT: Let's get some clarification here. To whom would you expose, or what parties would be permitted to see proprietary documents? Can you give us some indication of that?

MR. CARLSON: If documents are identified as proprietary to us --

THE COURT: Let us assume the document is identified as being proprietary -- documents which IBM states and represents here that they have delivered, which fall in the classification of proprietary documents.

MR. SCHWARZ: Yes, and if Mr. Thorman had taken a different position, we would have been more precise.

THE COURT: To whom would you describe those documents? Give me the broadest range that you can possibly

concaive or visualize.

MR. CARLSON: If identified as proprietary, I would expose them only to attorneys or persons working in the case your Honor.

MR. SCHWARZ: Why don't you agree to the paragraph 2?

THE COURT: That would be no problem.

MR. SCHWARZ: That is what I asked him to do on Friday. We can apply Paragraph 2 to both sides in the lawsuit.

MR. CARLSON: Until we have an indentification as to what is proprietary from the company that has produced the documents to us, I would certainly not concede -- and I don't think your Honor would expect me to concede -- that every document produced to the Government in this lawsuit is proprietary.

MR. SCHWARZ: Now we have a problem, because Mr. Thorman, before we produced any, said he wasn't going to show anything to anybody. I did not set up any procedure to distinguish between one kind of document and another. Moreover, it seems to me that almost all of our documents are proprietary. That is the reason you wanted them.

THE COURT: Let me see if I can follow each of you. You are saying, Mr. Carlson, that you don't want to be bound by any protective order concerning proprietary documents

until a document has been identified as a proprietary document, and once that is done, you would not expect to reveal those documents; isn't that it?

MR. CARLSON: That is correct. Not without the permission of the Court. That is correct. Or the permission of my party opponent.

THE COURT: What you seem to be saying, Mr. Schwarz, is that in the first instance with Mr. Thorman he agreed not to expose any documents, proprietary or otherwise.

MR. SCHWARZ: Therefore, I did not have any reason to distinguish.

THE COURT: But you don't insist upon that kind of a ruling. You don't insist that all documents be denied any exposure. You are insisting that only proprietary documents --

MR. SCHWARZ: Yes, making the point, in view of Mr. Thorman's flat statement to us, the burden should be on the Government to distinguish between proprietary and others.

THE COURT: Then I think you went on to say that the bulk, if not the substantial number of documents involved, are proprietary.

MR. SCHWARZ: Yes. That is the kind of document they wanted: documents with respect to financial conditions or product development and so forth.

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THE COURT: When these documents were submitted, were they denominated in any way as proprietary?

MR. SCHWARZ: They were not, your Honor. Given Mr. Thorman's flat statement, there wasn't any necessity to do that.

THE COURT: Because it was your understanding that all of these documents would be denied exposure?

MR. SCHWARZ: Yes. That is what I believe Mr. Thorman stated in the letter.

THE COURT: Now we have an agreement from you to the extent -- I don't mean a legal, binding agreement at the moment -- that you would not be opposed to the exposure of non-proprietary documents?

MR. SCHWARZ: Correct.

THE COURT: That would indicate some of the documents are non-proprietary?

MR. SCHWARZ: Yes. I am sure there are some.

THE COURT: Let's work out a stipulation based on your understanding of what should be protected and what should not be protected, to indicate that only proprietary documents may not be exposed without the order of the Court, and then take the next step of identifying documents which are proprietary as distinguished from documents which are non-proprietary. That would meet your problem, too, would it not, Mr.

Carlson?

MR. CARLSON: Yes, sir.

THE COURT: How many documents are involved, in toto?

MR. SCHWARZ: The Government has of our documents somewhere in the neighborhood of eight hundred thousand documents. Correct?

MR. CARLSON: I think fewer than that. If we can work out the ones that we think we should have access to by now, it may be nearly that.

MR. SCHWARZ: It's a lot.

THE COURT: Let's see if we can simplify your respective problems here.

In view of the number of documents involved and in view of the rather difficult task in time of sitting down and screening every one of these documents at this moment when there is no real issue of exposure, today or tomorrow or next week, or, for that matter, at any time -- I mean, you have no imminent problem of documents that you want to reveal; isn't that so?

MR. CARLSON: There may be some imminent, limited problems in the depositions that are now going on.

THE COURT: Would it help if we all shared the burden together, to this extent: Rather than undergo this

screening process, that when and if you want to expose a document or documents, before you do that, call it to the attention of the Court, and so we will take this on a fragmentary basis.

As you come to a point in your own litigation or in your own preparation where you want to expose documents 1 to whatever number, before doing that, get an order of the Court, at which point IBM will have an opportunity to raise the question of, "This is a proprietary document, and we don't think that should be exposed."

Would that help?

MR. SCHWARZ: Yes. I think in many cases we should consent prior to even bothering the Court.

MR. CARLSON: I have one problem. It is a cumbersome procedure, and it will be an imposition on your Honor that I think is unnecessary, as to much of the material, particularly that which has been collected with respect to events which occurred two or three or four or five years ago and further back.

It is commonly accepted precept, I think, that the proprietary nature of information in a fast-changing economy like ours becomes less and less sensitive as the date recedes. So that I would think we could categorize some documents as to type of information to give the Government some leads, some

counsel and others some leads as to the kind of document we are talking about, and we could break off at some given date, maybe with some exceptions as to particularly sensitive categories, and keep much of this away from the Court, just because it is the kind of housekeeping that we should do, that we counsel should do, and the Court should not do.

But I do not wish to put the Government in a position of agreeing to an order that will prevent us from making the preparation that we need to make. If we are going to be involved in a continual argument about documents that are borderline, that are really not sensitive, and have to bring them to this Court over and over again, we are going to create a terrible imposition on the Court, and I do not wish to do that.

THE COURT: I do not look forward with any great relish to it. I am trying to resolve the problem in a most convenient way. That is not necessarily the best way for me.

MR. SCHWARZ: Moreover, I would think if it turns out that we are unreasonable, your Honor is going to recognize that and is going to do something which is going to remove our unreasonableness.

THE COURT: Would it be more advisable for you and Mr. Carlson and whatever back-up you can bring to bear to screen these eight hundred thousand documents?

MR. SCHWARZ: In view of the fact that this is a hypothetical problem, as your Honor observed, in that we don't have yet anything that Mr. Carlson in fact plans to do, that would be something that would be not a terribly effective use of our time.

THE COURT: Well, I started out on the assumption that it was speculative. I am not quite so sure that that assumption is well taken, because Mr. Carlson has indicated in response to questions that the exposure of some documents may be imminent.

MR. SCHWARZ: I would certainly promptly deal with any documents Mr. Carlson notifies me that he wishes to show to some particular person. If, as I said, our position turns out to be unreasonable on that, I think the Court is capable of disciplining us in a fashion that we will not be unreasonable.

THE COURT: Do you envision a rather repeated encounter now of documents that you wish to expose in the next weeks, months et cetera, on a fairly regular basis?

MR. CARLSON: I would think so, yes, your Honor.

THE COURT: I think that casts a somewhat different light on the problem, because I think it would be most awkward to attempt to deal with things on this kind of a regular basis coming back here every week and every month, because

the time consumed in constant discussion with that kind of fragmentation I think would be wholly useless.

MR. SCHWARZ: The real problem is, in light of Mr. Thorman's flat statement, where ought the burden to lie, and that was on behalf of chief counsel for the Government a flat assurance that they were not going to show our documents.

THE COURT: What Mr. Carlson says is that he does not disagree with the policy enunciated by Mr. Thorman. Then he goes on to explain, really, what he thinks Mr. Thorman meant.

Isn't that what you did?

MR. CARLSON: I think Mr. Schwarz has picked a sentence out of context here. The prior paragraph says:

"While the department and its employees have no intention of using documents 'discovered' during this litigation for any purpose other than this litigation".

But I think that puts Mr. Schwarz on notice, as every party opponent to the cases, we are going to use the documents in the litigation, or we would not be discovering them.

THE COURT: Mr. Carlson calls your attention to the next paragraph upon which you rely so heavily, aside from this consideration, the consideration being while the depart-

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ment and its employees have no intention of using documents discovered during this litigation for any purpose other than this litigation, it would be the responsibility et cetera, and what Mr. Carlson is saying is that they don't intend to use the documents discovered during this litigation for any purpose other than this litigation.

MR. CARLSON: Exactly what I am saying, your Honor.

MR. SCHWARZ: The stipulation --

THE COURT: In other words, their policy, as I understand Mr. Carlson's interpretation, is not to reveal the contents of any documents for any purpose except for the purpose of use during this litigation.

MR. CARLSON: That is our policy, your Honor.

MR. SCHWARZ: Again, as a matter of interpretation, Mr. Thorman's language must be read against my stipulation. He said in this letter, in effect, that it is unnecessary. My stipulation provided, almost word for word, what the Government seeks to apply to us in Paragraph 2 of the order. It said that the documents shall be used only by the attorneys and people assisting the attorneys.

THE COURT: It can be also interpreted that Thorman's letter is a negation of your stipulation and a counter-offer. It would have been helpful if you had obtained a stipulation at that time.

MR. SCHWARZ: Yes. I think it turns out that it would have been helpful to obtain a stipulation from Mr. Thorman. I have great difficulty in understanding that letter as being other than a statement that the Government does not intend to display the documents.

I don't understand why the Government is not willing to apply to themselves the same order, Paragraph 2, that they seek to apply to us.

THE COURT: By that, you would take into consideration such language which would embrace the statement of policy here and Mr. Carlson's interpretation: such documents and information shall be made available only to those persons that counsel deems necessary in the conduct of the litigation and all attorneys and all such persons shall be notified of the entry thereof, which would take into consideration Paragraphs 2 and 3 of the July 21, 1970 letter.

Why wouldn't that take car of it?

MR. CARLSON: We have taken upon ourselves the burden of getting the documents that are proprietary and classified. As long as IBM does that for us, we have a given group of documents to address ourselves to. But to classify as proprietary seven or eight hundred thousand documents for the purpose of this case doesn't make sense.

THE COURT: The major distinction between you and

the language in Paragraph 2 is that they have already designated which documents are proprietary, whereas you have not.

MR. SCHWARZ: I had taken Mr. Thornan's letter as a statement that that was not necessary.

THE COURT: That will be applied to all the documents?

MR. SCHWARZ: Yes. I will notify Mr. Carlson of the documents which we will wish to have regarded as sensitive, commercial or proprietary.

THE COURT: Will that take care of the matter?

MR. CARLSON: I think the necessity will be, your Honor, that we will come back to your Honor with the stipulation on this particular matter, and I -- Well, one thought occurs to me. If we cannot arrive at a category that is sufficiently descriptive or would direct an individual identification of documents, the Government by proprietary order that covers a vast bulk of documents will be put in a very difficult preparation situation here. That is, namely, this:

If somebody walks in off the street and says, "I worked for IBM yesterday, and I want to tell you what was happening in this department at this time. Do you have these documents?" And I say, "Yes; I have these documents, sir," but I have to call IBM, because they are in this vast bulk of documents that are involved in the subject matter that this

witness wants to tell me something about as to IBM, so I call up Mr. Schwarz and tell him that I want to show this witness A, who has walked in off the street, documents numbering maybe a hundred of them, because they are in a vast bulk of documents, and then I wait until I get Mr. Schwarz's okay to show them to him.

That puts us in an impossible preparation position.

On the other hand, if we have a document that is identified as proprietary, I know I cannot show that to this man that walks in off the street, and I know that if I want to I have got to provide for it; I have to give notice to Mr. Schwarz, and if he will not permit me and if I think our preparation is inhibited, I have to come to this Court and tell the Court why I must talk to the man that walked in off the street about this document.

So that this goes back to our inability to know about the industry and the facts of the industry and the facts of IBM's operations without first IBM's documents and, second, the help of people who know something about the industry and about the documents and about the machines and about the various facets in the industry that we, the Government counsel, do not have access to as a matter of daily operations.

THE COURT: Let me take another tack for the moment.

As I understand your objection to Paragraph 2, it is not an objection to 2 but rather you would like to have the same thing.

MR. SCHWARZ: Correct.

THE COURT: There is no objection to 2 except that you want the same kind of protection.

Why does that have to be dealt with in the same stipulation?

MR. SCHWARZ: What I said to Mr. Carlson on the telephone Friday is that I wanted to bring it to the attention of your Honor.

THE COURT: You have no objection to 2?

MR. SCHWARZ: Right.

THE COURT: You don't have any objection to 3?

MR. SCHWARZ: Assuming that we are not going to find enormous overclassification of documents, I have no objection to 3.

THE COURT: We can't assume anything at this moment.

MR. SCHWARZ: There is no objection to 3 in principle.

THE COURT: What about 4?

MR. SCHWARZ: Number 4: The Government weeks to -- Well, 4 is what they are going to produce. 4 is not a limitation on us at all.

Form DJ-96a
(Rev. 6-22-66)

DEPARTMENT OF JUSTICE

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2.				
3.				
4.				

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION

REMARKS

Enclosed is a copy of portions of the May 10 pretrial transcript which relate to the "national security" documents and a copy of the Protective Order covering the "classified" and "proprietary" documents.

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